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Extrajudicial, summary or arbitrary executions

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns, submitted in accordance with Assembly resolution 67/168.

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Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions

Summary

In the present report, the Special Rapporteur provides an overview of his activities and considers two different topics relating to the protection of the right to life: (a) the role of forensic investigations; and (b) the application of the death penalty to foreign nationals.

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I. Introduction

1. The present report provides an overview of the activities carried out by the Special Rapporteur since the submission of his previous report to the General Assembly (A/69/265). In sections III and IV, the Special Rapporteur considers two different topics relating to the protection of the right to life: (a) the role of forensic investigations; and (b) the application of the death penalty to foreign nationals.

II. Activities of the Special Rapporteur

2. The activities carried out by the Special Rapporteur from 23 July 2014 to 6 February 2015 are outlined in his report to the Human Rights Council at its twenty-ninth session (A/HRC/29/37). In the thematic section of that report, the Special Rapporteur focused on the implications of information and communications technologies for the protection of the right to life.

A. International and national meetings

3. On 14 April 2015, the Special Rapporteur spoke at the high-level panel discussion on the death penalty in the framework of the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, held in Doha.

4. On 5 and 6 May, he participated in the second Glion Human Rights Dialogue, hosted by the Governments of Norway and Switzerland.

5. On 4 and 5 June, the Special Rapporteur participated in the expert meeting of the Working Group on the Death Penalty and Extrajudicial, Summary or Arbitrary Killings in Africa of the African Commission on Human and Peoples' Rights on the project of a general comment on article 4 of the African Charter on Human and Peoples' Rights, held in Kigali.

6. On 15 June, he made a presentation on the legal aspects of targeted unmanned aerial vehicle strikes in areas outside of active hostilities at the International Seminar on Improving Transparency, Oversight and Accountability for Any Use of Armed Unmanned Aerial Vehicles Outside Areas of Active Hostilities, organized by the United Nations Office for Disarmament Affairs and the United Nations Institute for Disarmament Research and held in Geneva.

7. On 15 June, he gave a briefing to Member States on the proper management of assemblies on his initiative and that of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, in Geneva.

8. On 16 June, the Special Rapporteur spoke at the expert meeting on the death penalty and foreign nationals, including migrant workers, organized by the Office of the United Nations High Commissioner for Human Rights (OHCHR) and held in Geneva.

9. On 17 June, he participated in a side event on the protection of rights of persons facing the death penalty abroad, including migrant workers, organized by OHCHR and held in Geneva.

10. Jointly with the International Service for Human Rights, the Special Rapporteur organized a side event on the use of information and communications technologies to promote human rights, held in Geneva on 19 June.

11. On 19 June, he spoke at the side event on the right to protest organized by Article 19 and held in Geneva.

12. He organized an expert consultation on the revision of the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, held in Geneva on 29 and 30 June.

13. On 14 July, the Special Rapporteur spoke on the topic "Extrajudicial executions: current challenges" at the University of Oxford-George Washington University Law School summer programme on international human rights law in Oxford, United Kingdom of Great Britain and Northern Ireland.

B. Visits

14. The Special Rapporteur visited the Gambia from 3 to 7 November 2014, at the invitation of the Government. His report on that country visit was submitted to the Human Rights Council in 2015 (A/HRC/29/37/Add.2).

15. Since his previous report to the General Assembly, the Special Rapporteur has sent requests for visits to the Governments of Egypt, Honduras, Nigeria, Pakistan, Ukraine and Yemen. The Special Rapporteur thanks the Governments of Iraq and Ukraine, which have responded positively to his requests, and encourages the Governments of Egypt, Honduras, the Islamic Republic of Iran, Madagascar, Nigeria, Pakistan, Sri Lanka and Yemen to accept his pending requests for a visit.

III. Role of forensic science in the protection of the right to life

16. The modern concept of human rights is premised on the approach that the violation of human rights norms has consequences: human rights standards are not merely preferences or aspirations. In line with this approach, it has been a central tenet of the mandate holder that the protection of the right to life has two components: the prevention of arbitrary deprivations of life; and accountability, should such deprivations occur. A lack of accountability is in itself a violation of the right to life. Accountability plays a central role in affirming the norm against arbitrary deprivations of life. As such, it also plays a vital preventive role. These two components thus create a self-reinforcing virtuous circle.

17. Accountability is a broad concept that is not limited to the legal or other finding that a specific individual or institution is responsible for a particular taking of life or to the sanctions imposed. Before such conclusions can be reached, an investigation into the events that transpired may be required. The more grave the alleged violation, the greater the need for investigation. Investigations are thus an integral part of the concept of accountability.

18. Good forensic science, for its part, plays an instrumental role in credible investigations, both those conducted immediately after the event and those where evidence emerges years later. The Special Rapporteur on torture and cruel, inhuman or degrading treatment or punishment has observed that "scientific evidence

obtained by thorough, impartial and independent forensic evaluations assists States to comply with their obligation systematically to investigate, prosecute and punish each incident of torture, and plays a major role in preventing future acts of torture by fighting impunity and holding perpetrators accountable" (see A/69/387, para. 20). The same is true of investigations into unlawful killings.

19. The intersection of the mandate of the Special Rapporteur and the process of investigations, including their forensic element, is made clear in one of the documents central to the mandate of the Special Rapporteur, the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (1991).[1] In the light of developments that have taken place since the present document was drafted, both in terms of technical practice and legal frameworks, it seems high time that it be updated. In this section of his report, the Special Rapporteur considers the role of forensic investigations in the full protection of the right to life before turning to the question of the updating of the Manual.

A. Duty to investigate in international law

20. Investigations into suspected violations of the right to life are necessary if respect for the right is to be ensured and to prevent the development of a climate of impunity. States have a duty under international law to investigate allegations of violations.

1. International human rights law

21. International human rights law mandates investigation when its norms have been breached. In particular, in article 2 (2) of the International Covenant on Civil and Political Rights, States are required to "adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant". The Human Rights Committee, in general comment No. 31, noted that "a failure by a State party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant".[2]

22. The Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions likewise call for "thorough, prompt and impartial investigation of all suspected cases of extralegal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death". The Principles stipulate that Governments must maintain investigative offices and procedures to undertake such inquiries. They then elaborate the purpose of the investigation, namely "to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death". Investigations should include "an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses" and should "distinguish between natural death, accidental death, suicide and homicide".[3]

[1] Adopted as E/ST/CSDHA/.12 (1991).
[2] See CCPR/C/21/Rev.1/Add.13, para. 15.
[3] Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (1989).

23. The form of the necessary investigations, particularly of those concerning the use of force by State agents, has been elaborated in other documents. For example, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials requires Governments and law enforcement agencies to "ensure that an effective review process is available and that independent administrative or prosecutorial authorities are in a position to exercise jurisdiction in appropriate circumstances". In cases where death or serious injury have resulted from law enforcement operations, officials must send a detailed report "promptly to the competent authorities responsible for administrative review and judicial control". Those affected by the alleged violation, their family or their legal representatives must enjoy access to an independent process, including a judicial process.[4]

24. In several decisions concerning the right to life or physical integrity, the Human Rights Committee has held that the failure to investigate and punish the perpetrators constitutes a violation of the Covenant. For instance, in *Bautista de Arellana v. Colombia*, the Committee held that the State party "is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations".[5]

25. Regional human rights bodies have made similar findings. The European Court of Human Rights found in *McKerr v. the United Kingdom* that "the obligation to protect the right to life under article 2 of the Convention [for the Protection of Human Rights and Fundamental Freedoms], read in conjunction with the State's general duty under article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force".[6] The Court highlighted a number of requirements for investigations. Governmental authorities must take "whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death".[7] The Court also noted that the next of kin must be involved in the process as necessary.[8]

26. In *Ergi v. Turkey*, which involved clashes between Turkey and Kurdish rebels, the Court similarly held that "neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out

[4] Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

[5] Human Rights Committee, communication No. 563/1993, *Bautista de Arellana v. Colombia*, views adopted on 27 October 1995, para. 8.6.

[6] European Court of Human Rights, *McKerr v. the United Kingdom*, Application No. 28883/95, judgement of 4 May 2001, para. 111. This finding reinforced the decisions concerning the requirement to investigate uses of force resulting in death previously found, for example, in *McCann and Others v. the United Kingdom*, judgement of 27 September 1995, series A, No. 324, para. 161 and *Kaya v. Turkey*, case No. 158/1996/777/1978, judgement of 19 February 1998, paras. 85-86.

[7] See *McKerr v. United Kingdom* (note 6 above), para. 113.

[8] See *McKerr v. United Kingdom* (note 6 above), para. 115.

of clashes with security forces".[9] Similarly, in *Isayeva v. Russia*, the Court held that the protection of article 2 continued to imply that there should be some form of effective judicial investigation when individuals have been killed as a result of the use of force in the context of armed conflict, namely indiscriminate shelling in Chechnya.[10] In *Jaloud v. the Netherlands*, the Court underlined the extraterritorial nature of the duty to investigate under article 2, including in armed conflict.[11]

27. Other human rights tribunals have arrived at comparable conclusions, both regarding the link between the absence of a credible investigation and impunity and the substantive requirements for credibility. Collectively, international human rights courts have elaborated a series of principles that such an investigation should observe, including that authorities must act on their own motion, act with independence, be effective and prompt.[12]

2. International humanitarian law

28. As noted above, the human rights law obligation to investigate violations of the right to life continues to apply during armed conflict albeit interpreted, during the conduct of hostilities, with reference to the complementary principles of international humanitarian law.[13]

29. However, in addition, humanitarian law imposes its own obligation to investigate. Common article 1 of the four Geneva Conventions requires that parties "undertake to respect and to ensure respect for the present Convention in all circumstances".

30. Article 146 of the Fourth Geneva Convention stipulates that each party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, "grave breaches", and shall bring such persons, regardless of their nationality, before its own courts. Alternatively, it may hand such persons over for trial to another party concerned, provided that that party has made out a prima facie case.

31. Article 87 (3) of Protocol I to the Geneva Conventions states that parties to the conflict "shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof". In its commentary on the Protocols, the International Committee of the Red Cross (ICRC) expressly contemplates investigations conducted by the commander, who would in such cases

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[9] European Court of Human Rights, *Ergi v. Turkey*, case No. 66/1997/850/1057, judgement of 28 July 1998, para. 85.

[10] European Court of Human Rights, *Isayeva v. Russia*, application No. 57950/00, judgement of 24 February 2005, para. 209.

[11] European Court of Human Rights, *Jaloud v. the Netherlands*, application No. 47708/08, judgement of 20 November 2014.

[12] In addition to the European jurisprudence discussed above, see generally Inter-American Court of Human Rights, *Case of the Ituango Massacres v. Colombia*, judgement of 1 July 2006; *Case of the "Mapiripan Massacre" v. Colombia*, judgement of 15 September 2005; and *Case of González et al ("Cotton Field") v. Mexico*, judgement of 16 November 2009.

[13] See discussion of the examples of the *Isayeva v. Russia* and *Jaloud v. the Netherlands* cases above.

"act like an investigating magistrate".[14] As emphasized in the commentary, whether concerned with military operations, occupied territories or places of internment, "the necessary measures for the proper application of the Conventions and the Protocol must be taken at the level of the troops, so that a fatal gap between the undertakings entered into by parties to the conflict and the conduct of individuals is avoided".[15] Thus, article 87 imposes a duty on members of the armed forces to act proactively in the face of potential or possible international humanitarian law violations.[16]

32. Organs of the United Nations have repeatedly cited the obligation to investigate and prosecute war criminals, ever since the very first session of the General Assembly in 1946, when it called upon States to apprehend war criminals and return them to those States where the offences were committed.[17] More recently, in 2005, the General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law. Paragraph 3 provides that "the obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law, includes, inter alia, the duty to ... investigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law".[18]

33. Although not explicitly included in Protocol II to the Geneva Conventions, the inclusion of the notion of command responsibility for failure to prosecute in the statute of the International Criminal Tribunal for Rwanda supports the idea of general applicability to non-international armed conflicts.[19]

B. Practice of investigations

34. Effective investigations into suspicious deaths can involve contributions from a very wide range of expertise. This can include forensic anthropology, archaeology, pathology, ballistics, toxicology, latent print identification and many others. It is increasingly recognized that all relevant experts in the disciplines must be able to report on a scene in a holistic fashion and to comment on the reports of others.

1. Importance of the independence of forensic investigators

35. As with any other dimension of a credible investigation, it is vital that forensic investigators be meaningfully (functionally) independent of the persons or institution that they are investigating.

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[14] ICRC, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Martinus Nijhoff Publishers, 1987), para. 3562.

[15] Ibid., para. 3550.

[16] Michael N. Schmitt, "Investigating violations of international law in armed conflict", *Harvard National Security Journal*, vol. 2, No. 1 (2011).

[17] General Assembly resolution 3(I).

[18] General Assembly resolution 60/147, annex, para. 3 (b).

[19] See Schmitt, "Investigating violations of international law" (footnote 16). Also see International Tribunal for the Former Yugoslavia, *Prosecutor v. Tadic*, case No. IT-94-I-I (2 Oct. 1995).

36. There is a debate about whether forensic science is best served by being based principally in the judicial mechanisms of law enforcement or rather in the medico-scientific realm of public health. In a report submitted to the United States Department of Justice, the National Academy of Sciences underlined that "forensic science serves more than just law enforcement; and when it does serve law enforcement, it must be equally available to law enforcement officers, prosecutors, and defendants in the criminal justice system". It was argued that an entity established to govern the forensic science community "cannot be principally beholden to law enforcement. The potential for conflicts of interest between the needs of law enforcement and the broader needs of forensic science are too great."[20]

37. A crucial element of functional independence is the right of access to salient information, which in the forensic context also includes the right to access to the scene(s) related to an incident. Another dimension or implication of this is that forensic investigators might sometimes require a privileged legal status, which can serve as a protection from personal or professional reprisal.

38. In certain contexts, it can be a valuable contribution towards independence, and credible independence, to have foreign specialists as part of an investigatory team. An ancillary benefit of such participation is the extent to which it can contribute towards capacity-building.

2. Role of ad hoc mechanisms, including international mechanisms

39. From time to time, with respect to violations that fall within the scope of this mandate, such as large-scale killing by law enforcement officials (for example, in the case of a public demonstration), the ordinary forensic investigatory body will likely be unable to complete a fully independent investigation. In such instances, there is a role for a specialized independent investigatory body that has full power of oversight over the organization or branch to be investigated, whether that is the police force, the army, the national intelligence agency or other.

40. In some circumstances, it is helpful for ad hoc mechanisms to have an international constituency. More generally, in view of the benefits of forensic expertise from around the world being able to interact and share best practices with each other, various forums have evolved to allow for such exchange. ICRC has established a forensics advisory board, which seeks to offer guidance to forensic practitioners, especially concerning their work in challenging humanitarian contexts. International non-governmental organizations such as Physicians for Human Rights can also meet this need.

41. In recognition of the salience of forensic expertise for human rights investigations, some United Nations special procedures mandate holders (most notably the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment) have developed the practice of taking a forensic expert with them on country missions.

42. At the level of international criminal investigation, the International Criminal Court has established a scientific advisory board to provide recommendations to the

[20] National Academy of Sciences, *Strengthening Forensic Science in the United States: A Path Forward* (Washington, D.C., 2009).

Prosecutor on the most recent developments in new and emerging technologies and scientific methods and procedures.[21]

3. Importance of capacity-building

43. Capacity with respect to forensic investigations varies broadly around the world. While this is not unexpected, it is important to the extent that, given the discussion above, this implies that the level of protection of the right to life may vary commensurately. It is therefore important that forensic capacity be considered, among development priorities, as a crucial element of support to criminal justice systems.

44. For all of the technological developments that may have taken place over the past 25 years, many of the most important developments have in fact been in terms of process; capacity-building should therefore be as much about education as about equipment.

45. One such methodological focus could be the importance of documentation. For an investigation to be credible, it is necessary that an external expert be able to review the documentation of the case and arrive at the same conclusions. An investigation that, in other dimensions, meets best practice and arrives at likely the correct conclusions but which has failed to properly document its methodology and findings cannot be endorsed by a reviewer. This "independent reviewability" should be a core component of capacity-building.

46. The necessary capacity-building applies not only to forensic specialists themselves, but also to other fields of the criminal justice system and even to the wider public in order to inform them about the role that forensic investigation can play.

C. Role of new technology in investigations

47. Throughout his mandate, the Special Rapporteur has examined the impact of technological developments on the protection of the right to life. In his report to the Human Rights Council in 2015, he highlighted the potential use of information communications technologies to achieve accountability for violations of the right to life. Consultations surrounding the use of information and communications technologies made clear the salience of questions concerning the collection of digital evidence by specialists and the role that such evidence can play within investigations. Conversely, new technology is providing new ways for conventional evidence to be collected, analysed and presented.

48. In some cases, this has involved the more general proliferation of basic and necessary equipment or the lowering of cost barriers to their use. For example, the relatively widespread availability of digital cameras has transformed the way in which forensic investigators can document scenes. In some contexts, investigators have used mobile phones (sometimes coupled with specially designed applications) to take or to transmit and archive evidentiary photographs.

[21] Available from www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1022.aspx.

49. In other cases, new equipment or techniques have enabled investigators to use fundamentally different tools. One such new technique is the digital reconstruction of the scene of the incident either by taking a laser scan at the scene or retrospectively reconstructing it from photographs or video footage. So-called photogrammetric reconstructions can range from the scale of a single object to the scale of large landscapes. Stereophotogrammetry is a kind of photogrammetry in which three-dimensional coordinates are made by taking measurements from two or more photographs taken from different positions. The result is a three-dimensional model of the object or area of land that can be combined with modelling software to produce accurate three-dimensional representations of structures, streets, towns or objects. Video motion tracking (currently used in surveillance, traffic control and human-computer interaction) can be used to analyse video evidence, identifying target objects in consecutive frames.

50. With respect to human rights investigations, this type of analysis can be invaluable in trying to draw conclusions from sometimes repurposed or partial evidence. For example, the experts involved in a Forensic Architecture project funded by the European Research Council collaborated on an investigation into the death of a 30-year-old man hit by a tear-gas canister during a peaceful protest in the village of Bil'in in the West Bank. A three-dimensional spatial analysis constructed from field measurements, videos, photographs and aerial images demonstrated that in order to travel with the trajectory shown in a video recorded by a passer-by, the canister had to have been fired at an almost direct angle, contrary to the Israeli army's regulations for the weapon's use. On the basis of this evidence, a judge ordered an official investigation into what soldiers had claimed was an accidental death.[22]

51. Interestingly, similar techniques can also be applied to much older cases. For example, prosecutors have used digital reconstructions of Nazi concentration camps in order to demonstrate what it would have been possible to see from particular posts and thus to build cases against former camp guards.[23]

52. The Special Rapporteur welcomes the fact that those who work with such technology have offered support for his mandate and looks forward to engaging constructively with this field. It is important to highlight, as he did in his recent report to the Human Rights Council regarding the importance of information communications technologies, that the technological innovations are not, on their own, sufficient to ensure greater accountability for violations of the right to life: it is important both that human capacity be developed to take advantage of the technology and that pre-existing forums of accountability be open to new forms or presentations of evidence.

D. Importance of identification

53. One technological development that has revolutionized the forensic investigation of human remains over the past several decades is the development

[22] Available from www.situresearch.com/works/bilin-report.

[23] Melissa Eddy, "Chasing death camp guards with new tools", *New York Times*, 5 May 2014. Available from www.nytimes.com/2014/05/06/world/europe/chasing-death-camp-guards-with-virtual-tools.html.

and continuing sophistication of techniques of DNA identification. This has had a number of impacts on the right to life.

54. One manner in which the mandate and DNA evidence intersect is the use of DNA evidence in exoneration proceedings on behalf of those convicted of capital crimes. While doubtless only the tip of the iceberg with respect to wrongful convictions, these cases underline the extent to which DNA can improve the accuracy of criminal investigations and, in several jurisdictions, has increased the threshold of the burden of proof.

55. In a similarly transformative fashion, DNA and the field of forensic genetics have been used to identify persons missing as a result of human rights violations or from multiple fatalities resulting from natural disasters or accidents. An awareness of the importance of this field for human rights, including the right to truth, led the High Commissioner for Human Rights to write a report on forensic genetics and human rights in 2010 (A/HRC/15/26). The report underlined the importance of establishing protocols for exhumation, ante mortem data collection, autopsies and identification based on scientifically valid and reliable methods and technologies; appropriate means of involving the communities and families concerned in the exhumation, autopsy and identification procedures; and procedures for handing over the human remains to the family. More generally, and along with Human Rights Council resolution 10/26, the report demonstrated that the use of forensic genetics, including the voluntary creation of genetic databanks, has a crucial role to play in identifying victims of serious violations of human rights and international humanitarian law.[24] The Working Group on Enforced and Involuntary Disappearances has also stressed the need for expanded use of DNA testing in this connection (see A/HRC/27/49, para. 112).

56. Across all dimensions of the forensic investigatory process, it is important to guard against unrealistic expectations of what the science can reveal (expectations among non-experts, which can be influenced by portrayals of forensic investigations in popular culture). These expectations can be particularly problematic when they lead policymakers to impose unnecessarily high thresholds on the standards of proof for identification of historical remains, which can lead to traumatic bottlenecks and delays in the return of remains to families.

E. Updating of the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions

57. The United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions is one of the earlier founding documents of the mandate.

58. For some time, the document has required updating and supplementation. Indeed, in a series of resolutions adopted between 1998 and 2005, the Commission on Human Rights (the predecessor of the Human Rights Council) called upon the Office of the High Commissioner and the then Crime Prevention and Criminal

[24] In addition to the work of OHCHR, the International Committee of the Red Cross also developed a helpful guidance publication entitled "Forensic identification of human remains" (Geneva, 2014). Available from www.icrc.org/eng/resources/documents/publication/p4154.htm.

Justice Division to consider a revision of the Manual and called upon the Secretary-General to provide funds to do so.[25]

59. These numerous resolutions notwithstanding, it does not appear that any work has been undertaken to update the Manual. Since the Commission became the Council in 2006, resolutions adopted in 2009 and 2010 referred back to the Commission's earlier resolutions.[26]

60. The Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions remains a frequently cited source of international standards with respect to the adequacy of an investigation. Regional human rights courts have referred both to the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and to the Manual in reaching findings on the inadequacy of investigations into suspicious deaths.[27] National courts have done the same when establishing guidelines for the investigation of killings by the police.[28] ICRC relied on the Principles and the Manual in its Study on customary international humanitarian law: a contribution to the understanding and respect for the rule of law in armed conflict (2005) and in its Guidelines for Investigating Deaths in Custody (2013).

61. The extent of the continued reliance on the Manual in international jurisprudence and by national legal entities emphasizes the need for the document to be up to date and comprehensive. It is to be expected that if the document is more up to date, it will more often and more readily serve as a guide.

62. The Manual should address, in substantive terms, all significant aspects of investigations of suspicious deaths. That is not to say that it must be a highly detailed guide on all aspects of investigations. The value of the Manual is in its generality rather than its detail: other individual documents (for example, the ICRC Guidelines for Investigating Deaths in Custody) may provide substantially more detail on specific aspects of the guidance, but the Manual should provide broad guidance for all those aspects.

F. Conclusion

63. **The right to life cannot be considered fully protected unless full investigations are conducted into any situation in which it may have been violated. Whether a death was arbitrary and thus unlawful can often only be established with reference to a full understanding of the circumstances of that death. This leads to a responsibility on the part of States to ensure that the circumstances of any unnatural death (or death that looks as though it may**

[25] Commission on Human Rights resolutions 1998/36, 2000/32, 2003/33 and 2005/26.

[26] Commission on Human Rights resolutions 10/26 and 15/5.

[27] See, for example, European Court of Human Rights, *Case of Nachova and other v. Bulgaria* (applications Nos. 43577/98 and 43579/98), 6 July 2005; European Court of Human Rights, *Case of Finucane v. the United Kingdom*, application No. 29178/95, 1 July 2003 and 1 October 2003; Inter-American Court of Human Rights, *Gonzalez et al. v Mexico*, case No. 281/02, 16 November 2009.

[28] See Supreme Court of India, Criminal Appellate Jurisdiction, *People's Union for Civil Liberties & Anr. versus State of Maharashtra & Ors. (Criminal Appeal No. 1255 of 1999)*, 23 September 2014.

have been unnatural) are investigated with reference to as much forensic expertise as necessary.

64. **Advances in forensic investigative techniques will continue to evolve. It is to be welcomed that international forums exist whereby such innovations can be shared at a global level and best practices can be exchanged. Dialogues such as these are likely to have a positive impact on the quality of investigation and therefore the protection of the right to life. However, there are also a great many potential non-technical impediments to an effective investigation. It is important, given the centrality of the duty to investigate to the enjoyment of so many human rights, that the human rights community remain engaged in the elaboration of standards and best practices for an enabling political and legal environment and the proper establishment of an investigation.**

65. **For this reason, the Special Rapporteur has undertaken a process, the need for which was underlined by the many expert practitioners with whom he has consulted, to update the United Nations** Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, **popularly referred to as the Minnesota Protocol.**[29]

G. Recommendations

66. **The Special Rapporteur encourages the participation and engagement of Member States, national forensic institutions and non-governmental organizations in the second round of public consultations concerning the revision of the Manual, which will likely be opened in January 2016.**

67. **Once revised, the Manual should be made broadly available. The Special Rapporteur will seek the assistance of States, intergovernmental organizations, international professional bodies, academics and others to ensure that the revised document reaches those who need to use it.**

68. **Human rights mechanisms, including national and regional mechanisms, should emphasize the need for comprehensive investigations and the role that properly instituted forensic capacity can play in them.**

IV. Application of the death penalty to foreign nationals and the responsibilities of States

69. The death penalty falls within the scope of the Special Rapporteur's mandate because the imposition of the death penalty in violation of international law standards constitutes an arbitrary execution and thus a violation of the right to life as protected, for example, in article 6 (1) of the International Covenant on Civil and Political Rights. As stated elsewhere, the Special Rapporteur is of the view that the time has come to regard international law as at least progressively abolitionist, in the sense that international law requires States to move away from the death penalty, if not immediately then at least over time (see A/67/275, paras. 39-42 and A/69/265, para. 90). It is true that article 6 (2) of the Covenant, by demanding that States that

[29] See www.ohchr.org/EN/Issues/Executions/Pages/RevisionoftheUNManualPreventionExtraLegalArbitrary.aspx.

still apply the death penalty do so only for the "most serious crimes", could be understood to provide a foothold for the death penalty in such extreme cases. That narrow foothold, however, has shrunk over the years. The drafting history suggests that international law requires at least the gradual reduction in the crimes for which the death penalty may be imposed.[30] The category of "most serious crimes" is now understood to cover only intentional killing, namely, murder (see A/67/275, para. 35).

70. Moreover, article 6 (6) of the Covenant states that nothing in article 6 "shall be invoked to delay or to prevent the abolition of capital punishment by any State party". The fact that the death penalty may have a foothold in article 6 (2), dealing with the right to life, may thus not serve as an argument against the contention that the modern interpretation of rights such as the right not to be subjected to torture, cruel or inhuman treatment or the right to dignity demands an end to this form of punishment (see A/67/279).

71. In the meantime, while a shrinking number of States still retain this form of punishment, the International Covenant on Civil and Political Rights and international law more broadly create a number of safeguards designed to regulate the death penalty.[31] These safeguards can generally be described as concerning the crime, stipulating as indicated above that it be the "most serious"; the process, underlining that there must be a trial that conforms strictly with standards of fairness set down elsewhere; and the offender, protecting certain groups, such as those under 18, pregnant women or persons with mental or intellectual disabilities.

72. In this section, the Special Rapporteur explores the extent to which violations of these safeguards particularly impact an already often marginalized group, namely, foreign nationals (including migrant workers) and what additional responsibilities States have in this regard.

73. Persons facing the death penalty abroad are often disadvantaged compared with nationals of the prosecuting State. They can be disproportionately and thus arbitrarily affected by the death penalty owing to unfamiliarity with the laws and procedures in the prosecuting State. They may also have limited access to legal aid and therefore inadequate or low-quality legal representation. They may be unable to understand the language in which proceedings are conducted. They are less likely to have a support network of family and friends.

74. Pursuant to article 2 of the International Covenant on Civil and Political Rights, each State party to the Covenant is required to respect and ensure respect for the provision on non-discrimination to all individuals within its territory and subject to its jurisdiction, including foreign nationals facing the death penalty. Further, the refusal of State authorities to allow foreigners the power to seek clemency or commutation could amount to a violation of article 6 (4) of the Covenant.

75. The imposition of the death penalty against foreign nationals often leads to a situation in which States that have abolished the death penalty for legal and ethical reasons and that comply with all international standards in this regard are

[30] Roger Hood, "The enigma of the 'most serious' offences", Center for Human Rights and Global Justice Working Paper, Extrajudicial Execution Series, No. 9 (New York, NYU School of Law, 2006).

[31] The safeguards set out in article 6 (2), (4) and (5) of the International Covenant on Civil and Political Rights are further elaborated in the United Nations safeguards guaranteeing protection of the rights of those facing the death penalty of 1984.

confronted with their citizens being detained elsewhere, subjected to unlawful procedures and, in some cases, executed.

76. Data suggest that foreign nationals, including migrant workers, especially from Asia and Africa, remain disproportionately affected by the death penalty in several States.[32] In Malaysia, death sentences have recently been issued against at least 37 foreign nationals, mostly for drug offences, and at least 250 Malaysians are under sentence of death abroad for drug offences. In Saudi Arabia, at least 33 foreign nationals were executed in the first half of 2015 alone.

77. In Indonesia, many foreign nationals are among the at least 149 persons convicted of drug-related offences who are reportedly on death row. Moreover, 247 Indonesians are on death row in other countries. In the United Arab Emirates, foreign nationals accounted for the largest number of people receiving death sentences in 2014, including nationals of Afghanistan, Bangladesh, Egypt, India, Kuwait, Pakistan and Saudi Arabia.[32] In the Islamic Republic of Iran, a large number of foreign nationals are on death row for drug crimes, including at least 1,200 Afghans. In the United States of America, a total of 139 individuals, representing 36 nationalities, are under sentences of death. Some 125 Filipino migrant workers are also on death row abroad. Seventy-five British nationals are facing execution abroad for offences including murder, drugs, terrorism and blasphemy. Nearly 120 Nigerians are facing the death penalty in China, more than 170 in Indonesia, Thailand, Malaysia and Viet Nam and 5 in Qatar, the United Arab Emirates and Saudi Arabia.[33]

78. Recent reports of the Secretary-General identified discrimination against foreign nationals facing the death penalty abroad as an area of concern when considering the application of the death penalty.[34] Recognizing the significance of the issue, the General Assembly, in its 2014 resolution on a global moratorium also called upon States to comply with their obligations under the Vienna Convention on Consular Relations and to respect the right of foreign nationals to receive information on consular assistance when legal proceedings are initiated against them.[35]

A. Discriminatory application of the death penalty

79. In addition to direct forms of discrimination with respect to the application of the death penalty to foreign nationals, there are a number of indirect ways in which broader discriminatory structures of death penalty systems tend to impact on foreign nationals.

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[32] Unless otherwise stated, the statistics cited here were collated by OHCHR before convening an expert meeting on the question of the death penalty and foreign nationals in June 2015.

[33] Information regarding Nigerians on death row was provided to OHCHR by the Legal Defence and Assistance Project, a non-governmental organization of lawyers and law professionals, engaged in the promotion and protection of human rights, the rule of law and good governance in Nigeria.

[34] See A/HRC/21/29, A/HRC/24/18 and A/HRC/27/23.

[35] Resolution 69/186.

1. Migrant workers

80. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides that migrant workers and members of their families shall have the right to equality with nationals of the State concerned before the courts and tribunals (article 18 (1)).

81. In many jurisdictions, however, migrant workers appear to face discriminatory justice. For example, the number of foreign domestic workers on death row in Saudi Arabia made headlines around the world in 2013, drawing attention to the treatment of foreign domestic workers.[36] Failures to meet fair trial standards have led some Governments to establish special task forces to protect their citizens working abroad (see A/HRC/21/29, para. 38).

82. In certain legal systems, the imposition of an execution can be avoided through the payment of *diya* or "blood money". It is important, where such provision exists, that it be applied transparently and without discrimination.[37] However, it remains the case that such systems can have a disproportionate impact on migrant workers, who cannot afford to pay the necessary sums.[38]

2. Drugs offences

83. There is also a link between the application of the death penalty to drugs offences (most commonly drug trafficking) and foreign nationals. A significant proportion of the perpetrators of trafficking crimes are foreign nationals. The very high proportion of migrants on death row in countries in South-East Asia and the Middle East may well be related to the fact that in many of those States, drug offences carry sentences of death.

84. The Special Rapporteur emphasizes that the death penalty for drug offences is in no circumstances permissible under international law. Both he and other actors, including the Human Rights Committee, have repeatedly underlined that drugs offences do not meet the threshold test of "most serious" crimes. The problem of migrants on death row for drugs offences is highlighted here not because it is normatively different, but because these cases make up a numerically significant proportion of cases. Moreover, as discussed below, this can have ramifications with respect to bilateral or multilateral assistance to programmes aimed at combating transnational drug trafficking.

3. Death penalty and poverty

85. The disproportionate impact of the death penalty on poorer communities has now been widely recognized. As equal justice campaigner Bryan Stevenson has frequently stated with respect to the United States, "It's better to be rich and guilty

[36] Gethin Chamberlain, "Saudi Arabia's treatment of foreign workers under fire after beheading of Sri Lankan maid", *The Observer* (London) 12 January 2013. Available from www.theguardian.com/world/2013/jan/13/saudi-arabia-treatment-foreign-workers.

[37] Michael Mumisa, *Sharia Law and the Death Penalty: Would Abolition of the Death Penalty be Unfaithful to the Message of Islam?* (London, Penal Reform International, 2015).

[38] The special task force established by the Indonesian Government has gone to the length of paying substantial sums in "blood money" to secure the release of Indonesians on death row. See, for example, Hands Off Cain, "Saudi Arabia: six Indonesians on death row released after Indonesia agreed to pay blood money", 3 June 2015. Available from www.handsoffcain.info/news/index.php?iddocumento=19303864.

than poor and innocent when charged with a serious crime". Recent research in India has drawn attention to this connection.[39]

86. One study of the discriminatory impact of criminal justice against the poor in the United States highlighted that, with only rare exceptions, those facing capital charges cannot afford a lawyer and hence rely on a State-appointed attorney to provide their defence. However, "while capital cases are among the most complex, time-intensive and financially draining cases to try, indigent capital defendants often are appointed attorneys who are overworked, underpaid, lacking critical resources, incompetent or inexperienced in trying death penalty cases".[40] The same considerations apply in many other countries.

87. Moreover, in some jurisdictions, legal aid systems commence only at the trial stage, which means that police and prosecutors can conduct their investigations of the poorest offenders completely free of oversight or intervention by a lawyer. By the time a case reaches a courtroom, it may already be too late to guarantee a fair trial.

4. Fair trial guarantees

88. As noted above, the safeguards surrounding the imposition of the death penalty require that it be imposed only after a fair trial. What constitutes a fair trial should be determined with reference to other areas of international law, including article 14 of the International Covenant on Civil and Political Rights.

89. One of the most obvious forms of an unfair trial is the conduct of legal proceedings against a person in a language he or she does not comprehend without making provision for interpretation. Article 14 (3)(f) of the International Covenant on Civil and Political Rights guarantees a defendant "the free assistance of an interpreter if he cannot understand or speak the language used in court". The 1996 Economic and Social Council resolution regarding the safeguards guaranteeing protection of the rights of those facing the death penalty, provides that States should "ensure that defendants who do not sufficiently understand the language used in court are fully informed, by way of interpretation or translation, of all the charges against them and the content of the relevant evidence deliberated in court".[41] This protection should extend beyond the courtroom: the provision of interpretation during police questioning is a vital safeguard and one of the most important contributions that early consular intervention can make.

90. Foreign nationals, including migrant workers, can find it difficult to access (and fund) a lawyer of appropriate experience to defend them throughout the different stages of an investigation ending in trial for a capital offence. This can be for a range of procedural, financial, linguistic or cultural reasons, but is a clear impediment to a fair trial.

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[39] Interview with Anup Surendranath, Assistant Professor at National Law University of Delhi, by Uttam Sengupta. Available from www.outlookindia.com/article/most-death-row-convicts-are-poor/292798.

[40] American Civil Liberties Union, "Slamming the courthouse door: denial of access to justice and remedy in America" (New York, December 2010).

[41] Economic and Social Council resolution 1996/15 entitled "Safeguards guaranteeing protection of the rights of those facing the death penalty", para. 4.

B. Role of consular assistance

91. Access to consular assistance is an important aspect of the protection of those facing the death penalty abroad. The Vienna Convention on Consular Relations requires all States to take every possible action to ensure reciprocal compliance with this safeguard, in line with the relevant provision on the right to seek consular assistance.

92. Under article 36 of the Convention, local authorities must inform all detained foreigners "without delay" of their right to have their consulate notified of their detention and to communicate with their consular representatives. This applies to all detained foreigners but is of particular significance to those who face the death penalty because of the irreversibility of the punishment. At the request of the national, the authorities must then notify the consulate of the detention without delay; they must also facilitate consular communication and grant consular access to the detainee. Consuls are empowered to arrange for their nationals' legal representation and to provide a wide range of humanitarian and other assistance, with the consent of the detainee. Local laws and regulations must give "full effect" to the rights enshrined in article 36. These protections for migrant workers are further elaborated in article 23 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

93. In several States, however, foreign nationals, including migrant workers, have been deprived of protection under the Vienna Convention on Consular Relations and sentenced to death without respect for fair trial standards. Foreign nationals, many of whom do not speak the language of the court in which they are being tried, often do not have access to interpreters. The denial of the right to consular notification and access is a violation of due process and the execution of a foreign national deprived of such rights constitutes an arbitrary deprivation of life, in contravention of articles 6 and 14 of the International Covenant on Civil and Political Rights.

94. The requirement that foreign nationals must be informed without delay after their arrest of their rights under the Vienna Convention on Consular Relations has been confirmed by the International Court of Justice. In its Avena ruling, the Court found that advisement of consular rights "without delay" means "a duty upon the arresting authorities to give the information to an arrested person as soon as it is realized that the person is a foreign national, or once there are grounds to think that the person is probably a foreign national". The Court also held that States should provide judicial "review and reconsideration" of convictions and sentences to examine the nature and consequences of consular rights violations in cases of foreign nationals facing severe penalties or prolonged incarceration.[42] The Inter-American Court of Human Rights also issued an advisory opinion on the right to information on consular assistance in the framework of the guarantees of the due process of law.[43]

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[42] International Court of Justice, *Case concerning Avena and other Mexican Nationals (Mexico v. United States of America)*, summary of judgement of 31 March 2004.

[43] Inter-American Court of Human Rights, *Advisory opinion OC-16/99 of October 1, 1999 requested by the United Mexican States: the rights to information on consular assistance in the framework of the guarantees of the due process of law*.

C. Responsibilities of States of origin or of transfer

95. In his prior report to the General Assembly on the death penalty, the Special Rapporteur noted with respect to the responsibility of States a distinction between the responsibilities of those States which have already abolished the death penalty and of those which have not yet done so (A/67/275, paras. 68-97). Abolitionist States can have responsibilities with respect to the continued application of the death penalty elsewhere in a number of ways, many of which have an impact on foreign nationals. First, they can be directly responsible for the transfer of a person to a retentionist jurisdiction (whether that person is their national or not); second, they can bilaterally or multilaterally assist in the legal process leading to a death sentence; and third, they can have responsibilities arising from the defendant being their own national.

96. Article 16 of the International Law Commission's Articles on State Responsibility prohibits complicity in internationally wrongful acts. It is internationally wrongful for any State to impose the death penalty in violation of international law and, hence, all States must refrain from providing assistance in situations where the death penalty might be imposed in such a manner, for example, where it might be imposed for drug-related offences or for other crimes that do not meet the threshold of "most serious".

97. In addition to this, once a State party to the International Covenant on Civil and Political Rights has abolished the death penalty, it may not reinstate it and it must not be complicit in the use of the death penalty anywhere, in any circumstances (see A/67/275, para. 76; CCPR/C/70/D/869/1999).

98. In this instance, "abolitionist" means States that have abolished the death penalty de jure. However, it could be argued that these obligations could also apply to States that are abolitionist in practice, for example, where an official moratorium on executions exists or if a State has signed the Second Optional Protocol to the International Covenant on Civil and Political Rights, but not yet fully abolished the death penalty in law.[44]

1. Refoulement and extradition

99. The extradition or deportation of an individual to a State where they are likely to face the death penalty is a clear example of a State facilitating the use of the death penalty elsewhere, since the death penalty can be imposed only with the assistance of the extraditing State. States that have abolished the death penalty are absolutely prohibited from transferring a person when they know or ought to know that there is a real risk of the imposition of the death penalty. States that retain the death penalty in law may transfer persons where there is a risk of the death penalty, but the transfer is lawful only where the requesting State adheres to all requirements imposed by international law (see A/67/275, paras. 74 and 77).

100. It has been well established that abolitionist States must seek effective and credible assurances that the death penalty will not be imposed before extraditing or deporting an individual to a State when there is a real risk that they will face the

[44] See Yuval Ginbar, Jan Erik Wetzel and Livio Zilli, "Non-refoulement obligations under international law in the context of the death penalty", in *Capital Punishment: New Perspectives*, Peter Hodgkinson, ed. (Westminster, United Kingdom, Ashgate, 2013).

death penalty.[45] Most States that have not yet abolished the death penalty willingly offer assurances when seeking extradition from abolitionist States (including now certain States within the United States that were initially reluctant).[44] In all cases, to render the transfer lawful, the assurances must comply with various standards, including making public the existence and terms of the assurance.

101. Ensuring that all States were able to cooperate with international criminal justice was one reason for the exclusion of the death penalty from the Rome Statute of the International Criminal Court and its abolition in Rwanda. More recently, the founding document of a special criminal court established in the Central African Republic can impose a maximum sentence of life imprisonment.

2. Cooperation and collaboration

102. A dilemma emerges when abolitionist States provide assistance to retentionist States in criminal matters and that assistance leads to the use of the death penalty. Even though the individual facing the death penalty in such cases may never have been in the jurisdiction of the abolitionist State, such assistance could amount to complicity in the death penalty. The same legal principles apply here as in the case of transfer of persons: States that have abolished capital punishment may not assist in bringing about the death penalty in other countries, while States that retain it in law may support only its lawful imposition (see A/67/275, para. 81).

103. At the most basic level, a State may share information or intelligence with another State concerning a criminal act, which may at some later stage be used as evidence in a judicial proceeding that results in a death sentence. Investigations by non-governmental organizations have highlighted how assistance from abolitionist States has contributed to death sentences for drug-related offences in the Islamic Republic of Iran and Pakistan.[46] Because such intelligence-sharing often occurs at an agency-to-agency level, it is important that States develop guidance for their officials in this regard.

104. Following recent executions in Indonesia, a proposed private member's bill in Australia would create an offence for public officials and former public officials "who disclose information resulting in a person being tried, investigated, prosecuted or punished for an offence that carries the death penalty in a foreign country".[47] An official found guilty of such a disclosure could face a jail term of up to 15 years, with a mandatory minimum sentence of 1 year. However, the bill contains an unfortunate exception that allows the Attorney-General to authorize assistance without such assurances in terrorism cases or any other case that involves an act of

[45] See communication No. 829/1998, *Judge v. Canada*, views adopted on 5 August 2002; European Court of Human Rights, *Case of Al-Saadoon and Mufdhi v. The United Kingdom (Application No. 61498/08)*, 2 March 2010); and A/69/288.

[46] Patrick Gallahue, Roxanne Saucier and Damon Barret, *Partners in Crime: International Funding for Drug Control and Gross Violations of Human Rights* (London, Harm Reduction International, 2012); Reprieve, "European Aid for Executions: how European counternarcotics aid enables death sentences and executions in Iran and Pakistan", November 2014. Available from www.reprieve.org.uk/wp-content/uploads/2014/12/European-Aid-for-Executions-A-Report-by-Reprieve.pdf.

[47] Australia, Foreign Death Penalty Offences (Preventing Information Disclosure) Bill 2015. Available from www.austlii.edu.au/au/legis/cth/bill/fdpoidb2015640/; Human Rights Watch, "Australian Government and the death penalty: a way forward", 20 May 2015. Available from www.hrw.org/news/2015/05/20/australian-government-and-death-penalty-way-forward.

violence that causes a person's death or that endangers a person's life (section 7(2)). This proposed text appears incompatible with Australia's commitment, as an abolitionist State, not to impose the death penalty for any offences or be complicit in the death penalty in any circumstances.

105. Aside from providing information concerning a specific case, two States may have a bilateral development agreement in place, again often at the agency-to-agency level, that can provide material assistance to the criminal justice system. As a question of policy rather than ad hoc cooperation, it ought to be more straightforward for States to ensure that they are not providing assistance to a legal system that is potentially collaborating in the imposition of death sentences. Prohibitions of trade in products that might be used in executions, such as the decision of the European Union in December 2011 to block the export of specific drugs to the United States, offer an example of how such non-cooperation can function.[48]

106. If abolitionist States require more guidance on what sort of assistance might constitute unlawful complicity in the death penalty, a non-exhaustive list should be drawn up by OHCHR detailing what assistance might be proximate enough to engage responsibility under the International Law Commission's Articles on State Responsibility. The United Nations Office on Drugs and Crime (UNODC) has already suggested that, for example, even training border guards who are responsible for the arrest of drug-traffickers ultimately sentenced to death "may be considered sufficiently proximate to the violation to engage international responsibility".[49]

107. In addition to bilateral assistance, States may contribute to multilateral assistance programmes (where the nature of the crime regarding which assistance is provided or the likelihood of the death penalty being imposed as a result are less directly obvious to the funding State). In his 2012 report, the Special Rapporteur called for guidelines to help States to engage in cooperative drug control efforts without departing from the human rights framework, including international standards on the death penalty, and that these guidelines should also assist in making operational the standards on State responsibility in this context (see A/67/275, para. 84). UNODC has itself recognized this tension, noting that where "a country actively continues to apply the death penalty for drug offences, UNODC places itself in a very vulnerable position vis-à-vis its responsibility to respect human rights".[49]

3. Particular responsibility for a State's own nationals: consular assistance

108. Several States have established specific programmes to support their nationals who are sentenced to the death penalty in other jurisdictions. For example, the Office of the Undersecretary for Migrant Workers' Affairs of the Department of Foreign Affairs of the Philippines provides legal assistance to Filipino migrant workers facing death sentences abroad. The Ministry of Foreign Affairs of Mexico also established a legal support programme, known as the Mexican Capital Legal Assistance Programme, for Mexicans facing the death penalty in the United States.

[48] Commission Implementing Regulation (EU) No. 1352/2011 of 20 December 2011.

[49] United Nations Office on Drugs and Crime (UNODC), "UNODC and the promotion and protection of human rights", position paper, 2012. Available from www.unodc.org/documents/justice-and-prison-reform/UNODC_HR_position_paper.pdf p. 10.

Between its inception in 2000 and February 2014, the programme intervened in 1,001 cases of first-degree murder and the interventions led to the prevention or reversal of the death penalty in 878 cases.[50] Several non-governmental organizations, including those working on migrant issues, also provide legal and other support to persons facing the death penalty abroad and to their families.

109. If it can empirically be shown that the provision of consular assistance can materially diminish the likelihood of the imposition of a death sentence (and the statistics made available by Governments with specialist programmes suggests that this is the case), then a Government that, when notified, does not take all reasonable steps to provide adequate consular assistance can arguably be said to have failed in its duty of due diligence to protect its nationals from arbitrary deprivations of life.

110. If States of origin are to be understood to have a duty of due diligence with respect to the provision of assistance to their nationals when facing the death penalty abroad, then it is important that guidance be developed as to how that assistance can best be provided. As a first step, OHCHR should draw together a set of best practices with respect to the provision of consular assistance in capital cases.

111. It is important to note that none of the above descriptions of additional responsibilities on the part of the State of origin in any way diminish the responsibilities of the receiving State to take all possible steps to ensure a fair trial, whatever the status of the defendant.

D. Conclusion

112. **The issue of foreign nationals has two independent but occasionally interacting implications for the application of the death penalty, firstly, in those places where it has not yet been abolished and secondly, to the extent that States that have abolished the practice continue to interact with the process elsewhere.**

113. **In places where it has not yet been abolished, the impact of the death penalty on foreign nationals draws attention to various structurally discriminatory dimensions to its application. Cases involving foreign nationals, with financial or linguistic barriers or sometimes explicit prohibitions, can underline the nexus between the death penalty and access to justice, which can equally impact domestic defendants.**

114. **At the same time, the direct responsibilities that other States have with respect to the protection of the right to life of their nationals, combined with the opportunities that States of origin have to intervene via consular services, can be seen to imply a duty of due diligence with respect to nationals potentially facing the death penalty overseas.**

E. Recommendations

115. **States that have not yet abolished the death penalty should establish a moratorium on executions and consider steps to move towards abolition. Where death sentences continue to be handed down, safeguards with respect to the**

[50] Statement of the Ministry of Foreign Affairs of Mexico, 11 March 2014, Geneva.

imposition of the death penalty must be fully respected. Death sentences should be imposed only for the most serious crimes, namely, those involving intentional killing, and only after a trial that meets the highest standards of fairness.

116. **Law enforcement officials have a duty to notify criminal suspects whom they have grounds to believe may be foreign nationals of their right to consular notification and access under the Vienna Convention on Consular Relations. This duty applies in all cases, but has potentially life-saving implications for those who may face the death penalty.**

117. **States that have abolished the death penalty are absolutely prohibited from forcibly transferring a person to States where they face a genuine risk of the death penalty, unless adequate, effective and credible assurances are obtained. States with long-standing moratoriums on the imposition of the death penalty (and as such are considered de facto abolitionist) should consider amending national laws on extradition and deportation in line with this prohibition.**

118. **Technical assistance provided by States in combating drug crime, whether directly or via a multilateral agency such as UNODC, must begin with the assertion that the imposition of the death penalty for drug offences is a flagrant violation of international law. Technical assistance should not be provided until assurances have been obtained that no death sentences will be imposed against individuals apprehended with the assistance of the programme and that reforms of the penal laws will swiftly be enacted in this area. In the event that such reforms do not take place within a reasonable period, the technical assistance programmes should be terminated.**

119. **States that have abolished the death penalty should take all reasonable steps to ensure that their citizens do not face the imposition of the death penalty overseas. Since the provision of consular assistance can materially diminish the likelihood of the imposition of a death sentence, a State that does not take all reasonable steps to provide adequate consular assistance could arguably be said to have failed in its duty of due diligence to protect its nationals from arbitrary deprivations of life.**

120. **OHCHR should draw up a non-exhaustive list of what assistance in criminal matters is proximate enough to the imposition of the death penalty to engage responsibility under the International Law Commission's Articles on State Responsibility. OHCHR should also develop guidance for States of origin on best practice with respect to the provision of consular assistance to their nationals potentially facing the death penalty.**